STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
(Borello, P.J., and Whitbeck and K. F. Kelly, JJ.)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

BOBAN TEMELKOSKI,

Defendant-Appellant.
_____/

Supreme Court No. 150643
Court of Appeals No. 313670
Wayne Cir. Ct. No. 94-000424-FH

DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF

ORAL ARGUMENT REQUESTED

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QUESTIONS PRESENTED

On June 9, 2017, this Court ordered supplemental briefing on the following three questions:

1. Should this case be held in abeyance pending final action by the United States Supreme Court in *Does #1-5 v Snyder*, 834 F3d 696 (CA 6, 2016)?

   Appellant says: No, as a decision by the United States Supreme Court is unlikely to resolve this case. The issue potentially before the U.S. Supreme Court—whether Michigan's Sex Offender Registration Act (SORA) imposes retroactive punishment in violation of the Ex Post Facto Clause—does not resolve this case, nor need this Court reach that issue. Instead, this Court can resolve this case by ruling on Mr. Temelkoski's due process claim, which provides a separate, independent and narrower basis for relief, or on his claim that SORA imposes unconstitutional retroactive punishment as applied to him because he was never convicted and his charges were dismissed under the Holmes Youthful Trainee Act.

2. Is a criminal defendant denied due process of law if a statute offers a benefit in exchange for pleading guilty, the defendant's plea is induced by the expectation of that benefit, but the benefit is vitiated in whole or in part, see *Santobello v New York*, 404 US 257 (1971); *Studier v Michigan Public School Employees' Retirement Board*, 472 Mich 642, 660 (2005)?

   Appellant says: Yes.

3. Did the Wayne County Circuit Court have jurisdiction over the defendant's claim in light of MCL 28.728c(4)?

   Appellant says: Yes.

INTRODUCTION

Almost a quarter century ago, Boban Temelkoski pled guilty under the Holmes Youthful Trainee Act (HYTA), MCL 762.11, *et seq*., a diversion program designed to prevent youthful offenders from suffering the lifelong consequences of a criminal record. After he successfully completed probation and other court-imposed conditions, his charges were dismissed with prejudice. At the time HYTA provided that "all proceedings regarding the disposition of the criminal charge and the individual's assignment as youthful trainee shall be closed to public inspection . . . ." 1993 PA 293, § 14(3) (effective Jan. 1, 1994). An adjudication under HYTA "is not a conviction for a crime and the individual assigned to the status of youthful trainee shall not suffer a civil disability or loss of right or privilege following his or her release from that status because of his or her assignment as a youthful trainee." *Id.* at § 14(2).

Today, Mr. Temelkoski is a registered sex offender. Michigan's Sex Offender Registration Act (SORA) imposes disabilities and restraints which are so extensive and harsh that the Sixth Circuit Court of Appeals has found they are punishment. *Does #1-5 v Snyder*, 834 F3d 696 (CA 6, 2016). Assuming for the sake of this brief, however, that SORA imposes only civil disabilities, Mr. Temelkoski does not suffer from those "civil disabilities" as a consequence of conviction, for he was not convicted. Nor are those restrictions based on a determination that he is a threat to public safety, for the state has never attempted to prove that he is. The only reason that Mr. Temelkoski is subject to restraints under SORA is "because of his [] assignment as a youthful trainee" back in 1994. *Id.* at § 14(2); MCL 28.722(b)(ii)(A).

Due solely to charges that were dismissed with prejudice under a statute providing for no civil disabilities and a sealed record, Mr. Temelkoski is now publicly branded as a "convicted sex offender" on Michigan's public internet registry. The site not only displays his photograph and personal details, but describes him as a Tier 3 (most dangerous) offender. See Registry

Printout, Appendix 237a, 238a. A clickable map points to exactly where he lives, with a pin superimposed over his home. *Id.* at 243a. He must report in person every three months, MCL 28.725a(3)(c), and must report immediately (within three days) in person for many minor changes in his life, such as if he gets a new email account, signs up for a college class, or borrows a car. MCL 28.725(1). His ability to use the internet or travel are constrained. MCL 28.725(1)(e)-(f); 28.727(1)(e), (i). He will be subject to all of these restrictions for the rest of his life. MCL 28.725(12).

The six questions posed by this Court in its original leave grant order, and the three new questions set out in this Court's order for supplemental briefing, all ultimately come down to the core question of whether it is constitutional for the state to so fundamentally alter the consequences attached to Mr. Temelkoski's plea.

SUMMARY OF ARGUMENT

This case should not be held in abeyance pending a decision by the United States Supreme Court in *Does #1-5 v Snyder*, 834 F3d 696 (CA 6, 2016), because that decision is unlikely to resolve this case, regardless of whether the Supreme Court affirms, reverses, or denies *certiorari*. Mr. Temelkoski seeks different relief than that granted in *Snyder*, where the Sixth Circuit prohibited retroactive application of the 2006 and 2011 amendments to Michigan's Sex Offender Registration Act (SORA). Mr. Temelkoski is not asking to be subjected to the 2005 version of SORA, but to be removed from the registry entirely. Moreover, only one of the issues in Mr. Temelkoski's case is potentially before the U.S. Supreme Court: whether SORA imposes retroactive punishment in violation of the Ex Post Facto Clause. This Court need not reach that issue, but if it does, that issue would not dispose of this case because Mr. Temelkoski has other claims. This Court can and should resolve this case by ruling on Mr. Temelkoski's due process claim, which provides a separate, independent and narrower basis for relief, or on his

claim that SORA imposes unconstitutional retroactive punishment as applied to him because he was never convicted and his charges were dismissed under the Holmes Youthful Trainee Act (HYTA).

The stability of our criminal justice system depends on the enforcement of agreements that the state makes with defendants, including agreements made in diversionary programs. Mr. Temelkoski's plea, consent to HYTA and assignment to HYTA created an enforceable agreement between him and state. That agreement incorporates by reference the terms of the 1994 HYTA statute, which provided for a sealed record and no civil disabilities if Mr. Temelkoski successfully completed conditions imposed by the court. Mr. Temelkoski performed, but the state has not upheld its end of the bargain. Due process bars the state from reneging on the agreement it made. *Santobello v New York*, 404 US 257 (1971). Unlike in *Studier v Michigan Public School Employees' Retirement Board*, 472 Mich 642, 660; 698 NW2d 350 (2005), where the plaintiffs relied on the statute itself to contrive an unmodifiable contractual relationship between the state and beneficiaries of the statute, Mr. Temelkoski seeks to enforce an individual agreement that both he and the state were authorized to enter into under the 1994 version of HYTA.

The Wayne Circuit Court had jurisdiction over Mr. Temelkoski's claims. In light of the language of MCL 28.728c(4), the statute's legislative history, and the requirement in *Webster v Doe*, 486 US 592, 603 (1988), for a "heightened showing" that the legislature intended to foreclose review of constitutional claims before a law is construed to strip jurisdiction in that way, MCL 28.728c(4) should be interpreted as channeling statutory petitions for review of registration, not as barring constitutional claims. This construction is also compelled by the doctrine of constitutional avoidance: MCL 28.728c(4) cannot foreclose review of constitutional

claims because the legislature cannot authorize constitutional violations. *Sharp v City of Lansing*, 464 Mich 792, 808–09; 629 NW2d 873 (2001).

ARGUMENT

I. THIS COURT NEED NOT AWAIT FINAL ACTION IN *SNYDER* BECAUSE MR. TEMELKOSKI'S DUE PROCESS CLAIM PROVIDES A SEPARATE AND NARROWER BASIS TO GRANT HIM THE RELIEF HE SEEKS, AND BECAUSE *DOES V SNYDER* CAN ONLY PROVIDE GUIDANCE ON, BUT CANNOT RESOLVE, MR. TEMELKOSKI'S EX POST FACTO CLAIM.

In *Does #1-5 v Snyder*, 834 F3d 696 (CA 6, 2016), the Sixth Circuit held that Michigan's Sex Offender Registration Act (SORA), MCL 28.721 *et seq.*, is punishment, and that its retroactive application violates the Ex Post Facto Clause of the United States Constitution, art I, § 10, cl 1. Specifically, the Sixth Circuit barred retroactive application of the 2006 SORA amendments, which imposed geographic exclusion zones criminalizing living, working or "loitering" within 1000 feet of a school, and the 2011 SORA amendments, which, *inter alia*, imposed extensive in-person reporting requirements, labeled registrants by purported tiers of dangerousness, and subjected many registrants to supervision for life. *Snyder*, 834 F3d at 706.

After the Sixth Circuit's decision in *Snyder*, the state unsuccessfully sought a stay, first from the Sixth Circuit and then from the United States Supreme Court. Order Den Stay, *Does #1-5 v Snyder*, (No. 15-1536), ECF No. 66-1 (CA 6, Nov 7, 2016); Letter Den Stay, *Snyder v Does #1-5*, (No. 15-1536), ECF No. 67-2 (Nov 15, 2016). Thereafter, the state petitioned for *certiorari*. *Snyder v Does #1-5*, (No. 16-768), 2016 WL 7335854 (Dec. 14, 2016). The Supreme Court called for the views of the U.S. Solicitor General, and the acting Solicitor General recommended that the Court **deny** *certiorari*. The brief of the United States explains that the Sixth Circuit applied the correct legal standard (namely the intent-effects test set out in *Smith v Doe*, 538 US 84 (2003)), and that there is no circuit split because "[i]n light of the variation among jurisdictions' sex-offender-registration laws, courts may reach different ex post facto

results without creating conflicts over legal principles." Brief for United States as Amicus Curiae, *Snyder v Does #1-5* (No. 16-768), 2017 WL 2929534, at *15 (July 7, 2017). A decision on whether the Court will hear *Snyder* is expected in October.

It is unlikely, however, that whatever action the U.S. Supreme Court takes in *Snyder* will resolve this case, regardless of whether the Court affirms, reverses, or denies *certiorari.* Mr. Temelkoski seeks different relief than that granted in *Snyder*, where the Sixth Circuit prohibited retroactive application of the 2006 and 2011 amendments to SORA.[1] Mr. Temelkoski is not asking to be subjected to the 2005 version of SORA, which itself imposed extensive disabilities on registrants, including regular in-person reporting and publication of detailed personal and "conviction" information on a public internet registry. 2004 PA 239; 2004 PA 240 (effective Oct 1, 2004). Rather, Mr. Temelkoski is asking to be removed from the registry, in accordance with the law at the time of his HYTA plea.

Mr. Temelkoski is also pursuing claims that raise different questions from those which would be before the U.S. Supreme Court in *Snyder*. That Court, if it grants *certiorari* in *Snyder*, will not consider the due process question that is so central here: Does requiring Mr. Temelkoski to register as a sex offender violate due process under both the federal and Michigan Constitutions because, when he pled guilty under HYTA in 1994, that statute provided that he would suffer no civil disabilities and his record would be closed to public inspection?

Snyder does bear on three of the six questions on which this Court originally granted leave:

[1] Whether the 2006 and 2011 amendments are severable from the remainder of the statute is an open question, which the parties in *Snyder* have agreed to defer until after a final resolution of the state's petition for certiorari. *See* Stipulated Order Granting Interim Injunctive Relief on Remand, *Does v Snyder*, (2:12-cv-11194), ECF No. 138, Pg ID# 6247, (ED Mich, April 3, 2017).

> (1) whether the requirements of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., amount to "punishment," see *People v Earl*, 495 Mich 33; 845 NW2d 721 (2014);
>
> (2) whether the answer to that question is different when applied to the class of individuals who have successfully completed probation under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq*.; and
>
> . . . .
>
> (5) whether requiring the defendant to register under SORA is an ex post facto punishment, where the registry has been made public, and other requirements enacted, only after the defendant committed the instant offense and pled guilty under HYTA, U.S. Const, art I, § 10; Const 1963, art 1, § 10.

The Sixth Circuit's decision, while not binding, answered the first question (for federal law only) and provided guidance in answering the other two.[2] If the U.S. Supreme Court grants *certiorari*, it will give a binding answer to the first question (for federal law only), and may or may not provide guidance on questions two and five. As this Court recognized in framing the questions on which leave was granted, this case does not simply concern whether SORA is punishment in general (as in *Snyder*), but whether SORA is punishment when applied to a HYTA trainee who pled guilty prior to the enactment of SORA. Any U.S. Supreme Court decision in *Snyder* will not squarely resolve that question.

Mr. Temelkoski's ex post facto claim is even stronger than that of the *Snyder* plaintiffs because his charges were dismissed under HYTA and he does not have a criminal record. The U.S. Supreme Court's reasoning in *Smith*, where a divided court upheld a first-generation registration statute against an ex post facto challenge, does not apply in these circumstances. The *Smith* majority concluded that an Alaska registration statute was not punishment because there

[2] While the Sixth Circuit decided that SORA is punishment for registrants in general, the court was particularly troubled by the case of the one *Snyder* plaintiff who, like Mr. Temelkoski, had had his charges dismissed under HYTA. *See Snyder*, 834 F3d at 703 ("But for SORA's retroactive application to him, his criminal record would not be available to the public. Thus, unlike the statute in *Smith*, the ignominy under SORA flows not only from the past offense, but also from the statute itself.").

was no evidence that it had "led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred through the use of routine background checks by employers and landlords." 538 US at 100. Because a routine background check would not show Mr. Temelkoski's dismissed HYTA case, every consequence he suffers is uniquely attributable to SORA. The *Smith* majority likewise reasoned that "[a]lthough the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record." *Id.* at 101. Again, that is not true here because Mr. Temelkoski has no conviction. Finally, the *Smith* majority described Alaska's internet registry as "analogous to a visit to an official archive of criminal records"—simply making conviction information more readily available to the public. *Id.* at 99. Here, by contrast, a person visiting a criminal records archive would find no information about Mr. Temelkoski, as his case was dismissed and his record was sealed under HYTA. In short, the analytical justifications for treating first-generation registry statutes as non-punitive cannot justify retroactively applying SORA to Mr. Temelkoski.

As noted in prior briefing, if this Court rules in Mr. Temelkoski's favor on due process grounds, it will not be necessary for this Court to rule on the ex post facto issue at all. See Appellant's Reply Brief, at 7 n 2. Since the due process claim provides a separate, independent, and narrower basis for relief, appellant believes a due process ruling is the most straightforward way to resolve this case. Alternately, if the Court wishes to decide the case on ex post facto grounds, it need not reach the larger question of whether SORA is punishment (question 1), but can rule for Mr. Temelkoski based simply on the fact that *Smith*'s reasoning does not apply to a

HYTA trainee who was never convicted, whose dismissed charges are sealed, and who would suffer no disabilities but for the fact that he is on the registry. See Questions 2 and 5.

II. DUE PROCESS BARS THE STATE FROM RENEGING ON THE AGREEMENT IT MADE WITH MR. TEMELKOSKI.

A. The Stability of the Criminal Justice System Depends on Enforcement of Bargains the State Makes with Defendants.

"[O]urs is for the most part a system of pleas, not a system of trials." *Missouri v Frye*, 566 US 133, 143 (2012) (citation and quotation marks omitted). "The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties." *Id.* at 144. It also means that the integrity of our criminal justice system—in which roughly 94% of convictions now result from guilty pleas, most of which are the result of plea or charge bargaining—depends on the government abiding by the bargains it has made. See *id.*; US Dep't of Justice, Bureau of Justice Statistics, *Plea and Charge Bargaining* (2011).[3]

Increasingly, our criminal justice system depends not just on plea bargaining, but also on diversion programs and problem solving courts. While Michigan has used the Holmes Youthful Trainee Act since 1967, in recent years Michigan has created numerous other diversion programs, including drug courts, sobriety courts, veterans courts, and mental health courts. This Court's report, *Michigan's Problem-Solving Courts: Solving Problems, Saving Lives, 2016 Performance Measures and Outcomes*,[4] explains that as of September 2016, Michigan has 185 problem-solving courts that reach 97 percent of the state's population. *Id.* at 2. These courts "have been extraordinarily successful in solving problems and saving lives." *Id.* During the

[3] Available at https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf.

[4] Available at http://courts.mi.gov/administration/scao/resources/documents/publications/reports/pscannualreport.pdf.

2015-2016 fiscal years, there were 9,586 active drug court cases, 1,005 participants in mental health courts, and 446 veterans discharged from veterans treatment courts. *Id.* at 2–5.

While the details of these programs vary, they all operate on the same basic principle as HYTA: if the defendant consents to participate in the program and pleads guilty,[5] the court does not enter a judgment of conviction but instead orders that if the defendant satisfies certain court-imposed conditions, the charges will be dismissed, the record sealed, and the defendant will get a "fresh start." See, e.g. MCL 600.1068 *et seq.* (establishing drug treatment courts; if defendant successfully completes probation and other conditions, "the court shall comply with the agreement made with the participant upon admission into the drug treatment court," MCL 600.1076(2)); MCL 600.1200 *et seq.* (establishing veterans courts; if defendant successfully completes treatment, "the court shall comply with the agreement made with the participant upon admission into the veterans treatment court," MCL 600.1209(2)); MCL 600.1090 *et seq.* (establishing mental health courts; providing for dismissal without conviction or disabilities if defendant successfully completes court-imposed terms, MCL 600.1098); MCL 333.7411 (for first-time drug possession or use, court may impose probation and set conditions; charges are dismissed without conviction or disabilities if defendant complies); MCL 436.1703(3) (minor in possession of alcohol); MCL 769.4a (first-time spousal/partner abuse); MCL 750.350a(4) (parental kidnapping).

[5] In several of the diversion programs, a court can also assign a defendant to the program if the defendant is found guilty, but the defendant must consent to participation. See, e.g. MCL 600.1094(1) (mental health court); MCL 769.4a(1) (first-time spousal/partner abuse); MCL 750.350a(4) (parental kidnapping).

In all of these programs, the plea and sentencing structure reflects a *quid pro quo* between the state and the defendant.[6] The defendant gives up his or her constitutional rights in the criminal justice system and agrees to participate in the diversionary program or problem-solving court. The court defers entry of a judgment of conviction and holds out the promise of a sealed record if the defendant successfully completes conditions set by the court, such as probation, drug treatment, or community service. The legislative framework shapes the terms of this exchange, specifying which defendants are eligible, what conditions they must fulfill, and what relief they will be granted if the program is offered to them and they hold up their end of the deal. In other words, the legislature establishes the terms of the bargain that the state makes with individual defendants who participate in diversion programs and problem solving courts.

Understanding this larger context is important, because if this Court were to hold—as the prosecution proposes—that the state can renege on promises made to Mr. Temelkoski under

[6] For some programs prosecutorial consent is required but in others the authorizing statute permits the court to assign the defendant to the diversionary program, and if the defendant is successful, to dismiss the defendant's charges without the consent of the prosecutor. Compare MCL 600.1068(2) (drug court); MCL 600.1201(4)(c) (veterans court); MCL 600.1095(1)(b)(iii) (mental health court); MCL 769.4a(1) (first-time spousal/partner abuse), with MCL 333.7411(1) (drug diversion); MCL 436.1703(3) (minor in possession of alcohol); MCL 750.350a(4) (parental kidnapping). In 1994, when Mr. Temelkoski was assigned to HYTA, prosecutorial consent was not required. 1993 PA 293, § 11. Under the current version of HYTA, prosecutorial consent is required for youth aged 21-24, but not for younger youth. MCL 762.11(1).

Thus, participation in a diversion program or problem solving court may or may not be a subject of bargaining between the prosecutor and the defendant. The parties may negotiate either because consent is required or, where consent is not required, because the defendant seeks a prosecutorial recommendation for participation in the diversion program. However, under statutes that do not require prosecutorial consent, like the 1994 version of HYTA, a bargain with the prosecutor is not a prerequisite for an assignment to the diversion program. And in all cases it is ultimately the court that must determine that the diversion program is appropriate and the court that enters an order providing that if the defendant completes certain court-imposed conditions, the defendant will receive something in return, typically dismissal of charges, a sealed record and freedom from conviction-related civil disabilities. Thus, when the defendant is assigned to the program, the defendant has a deal with the state, not simply with the prosecutor, who may or may not have been involved.

HYTA in 1994, that would mean that the state could likewise renege on similar promises made today through other diversion schemes, undermining the stability of programs that have become core components of Michigan's criminal justice system. Defendants adjudicated in those other programs have—like Mr. Temelkoski—been promised certain benefits by the state in exchange for pleading guilty, agreeing to participate in a diversion program, and then successfully completing conditions set by the court.

The legislature is free to decide whether it wants Michigan to have drug courts or veterans courts or HYTA. The legislature is likewise free to alter the conditions attached to diversion programs, revising who is eligible, what conditions they must fulfill, and what relief the court can promise them if they comply with those conditions. What the state cannot do, however, is renege on the promises it has **already** made to the thousands of individuals who annually participate in existing diversion programs, complying with court-ordered conditions in order to receive benefits set out in the statutes under which they pled and were sentenced. If the state can vitiate the bargain it made with Mr. Temelkoski, then it can likewise retroactively re-label graduates of problem-solving courts or other diversion programs as convicted criminals and impose on them precisely the consequences that they worked so hard to avoid. Defendants who were successfully rehabilitated in drug court could retroactively have their dismissed charges listed as convictions on their criminal history records and be publicly labeled as drug abusers. The state could decide that old dismissed "minor in possession" charges should appear on background checks as convictions. Graduates of mental health court, who admitted to drug use

during the course of treatment, could in future be prosecuted based on those admissions, even though the relevant statute, MCL 600.1096(3), today expressly bars such prosecutions.[7]

"[T]rust between defendants and prosecutors [] is necessary to sustain plea bargaining—an 'essential' and 'highly desirable' part of the criminal process." *Puckett v United States*, 556 US 129, 141 (2009) (quoting *Santobello*, 404 US 257). Trust is also critical to the success of diversion programs and problem-solving courts, which are an essential and highly desirable part of the criminal process. If that state can retroactively decide to take away benefits that it promises through diversion programs and problem-solving courts, that trust is in jeopardy.

B. Mr. Temelkoski's Plea and Assignment to HYTA Created an Enforceable Agreement Between Him and the State.

"Plea agreements involve a *quid pro quo* between a criminal defendant and the government." *INS v St Cyr*, 533 US 289, 321 (2001). "In exchange for some perceived benefit, defendants waive several of their constitutional rights," *id.* at 322, including "the fundamental rights to a jury trial, to confront one's accusers, to present witnesses in one's defense, to remain silent, and to be convicted by proof beyond all reasonable doubt." *Santobello*, 404 US at 264 (Douglas, J., concurring) (citations omitted). See also *People v Killebrew*, 416 Mich 189, 200; 330 NW2d 834 (1982) ("[T]he defendant may be persuaded to surrender his valuable right to trial with its accompanying rights and procedural safeguards in exchange for concessions aimed at sentence reduction and certainty."). In return, the government receives "immediate and tangible benefits" from plea agreements, "such as promptly imposed punishment without the

[7] But see *People v Wyngaard*, 462 Mich 659, 664-65, 667; 614 NW2d 143 (2000) (holding that use of statements defendant made at a prison disciplinary hearing during a subsequent criminal proceeding in breach of an agreement not to use such statements violated "elementary notions of due process" and that due process requires that "defendant's detrimental reliance be cured" through suppression of the statements).

expenditure of prosecutorial resources." *Town of Newton v Rumery*, 480 US 386, 393 n 3 (1987). Therefore, "[a]lthough the analogy may not hold in all respects, plea bargains are essentially contracts." *Puckett*, 556 US at 137 (citing *Mabry v Johnson*, 467 US 504, 508 (1984)). See also *People v Reagan*, 395 Mich 306, 313-14; 235 NW2d 581 (1975) (describing plea agreements as binding bargains).

When a plea is entered, it is a bargain between the defendant and "[t]he state, in the persons of the prosecuting attorney and the judge," each of whom "has at [their] disposal various concessions to induce the defendant's guilty plea." *Killebrew*, 416 Mich at 199. The prosecutor serves as the "bargaining agent" of the people, *Reagan*, 395 Mich at 313, while the court must ensure that "the agreed-upon disposition will serve the interests of justice."[8] *Killebrew*, 416 Mich at 207. Thus, it is the court's acceptance of the plea that creates the contract with the state itself.[9] If the defendant pleads, but the courts declines to impose the agreed-upon disposition, the defendant can withdraw his/her plea because the defendant's waiver of constitutional rights cannot be knowing or voluntary if it "was induced by reliance on a total package of concessions by both parties to which one party—the state—is no longer bound." *Killebrew*, 416 Mich at 207. If, however, the court accepts the plea, then both the state and the defendant are bound by the

[8] The plea process is best understood as involving two potential bargains. First, the prosecutor and the defendant can bargain, for example by agreeing that if the defendant cooperates, the prosecutor will make a specific sentencing recommendation. That deal binds the prosecutor and the defendant, but it does not yet bind the state for "the judge must be involved ultimately in the sentence-bargaining process." *Killebrew*, 416 Mich at 205. If the court "finds that the bargain is not tailored to reflect the particular circumstances of the case or the particular offender, he shall reject the plea." *Id.* at 207. If, however, the court finds that the proposed disposition serves the interests of justice, accepts the defendant's plea, and imposes the agreed-upon sentence, the state is bound by the terms of the deal. *Id.* at 207, 211.

[9] See *Commonwealth v Martinez*, 147 A3d 517, 531–32 (Pa 2016) ("a plea agreement is not valid and binding until it is evaluated and accepted by . . . a trial court"; "prior to the entry of a guilty plea, the defendant has no right to specific performance of an agreement").

terms of that deal. See *People v Martinez*, 307 Mich App 641, 654–55; 861 NW2d 905 (2014) (plea became binding "when the circuit court accepted it").

In Mr. Temelkoski's case the "contract" was formed on March 4, 1994, when the court accepted his plea of guilty and assigned him to HYTA trainee status. In 1994, the Holmes Youthful Trainee Act provided:

> If an individual pleads guilty to a charge of a criminal offense, other than [certain specified offenses] committed on or after the individual's seventeenth birthday but before his or her twenty-first birthday, the court of record having jurisdiction over the criminal offense may, without entering judgment of conviction and with the consent of the individual, consider and assign that individual to the status of youthful trainee.

1993 PA 293, § 11. Thus, for eligible youth to be assigned to HYTA required three things: (1) a guilty plea by the defendant; (2) the consent of the defendant to the HYTA assignment; and (3) a judicial determination that HYTA was appropriate.

In Mr. Temelkoski's case, all three of these things occurred. He pled guilty on March 4, 1994. Register of Actions, Appendix 7a. He consented to adjudication under HYTA by filing to receive HYTA status. Register of Actions, Appendix 7a (Feb 11, 1994 entry). *People v Bandy*, 35 Mich App 53, 58; 192 NW2d 115 (1971) (a "petition to be considered as a youthful trainee under the act is surely consent"). The record also contains an undated form titled "Application and Consent—Youthful Trainee," which was signed by Mr. Temelkoski and his mother. Appendix 9a. The form states that Mr. Temelkoski waived his right to a "speedy trial" in order to allow for a "pre-acceptance investigation by the Probation Department for the purpose of obtaining information useful to this Honorable Court in determining [his] suitability for assignment to the status of Youthful Trainee." Appendix 9a. The form states that Mr. Temelkoski had been advised by counsel of his constitutional rights (e.g. right to jury trial, right to remain silent, right to confront witnesses at trial, etc.). *Id.* The form further states that he had been informed

about the provisions of HYTA. *Id.*[10] Finally, the judge, having determined that HYTA was appropriate, assigned him to HYTA on March 4, 1994. Order of Probation, Appendix 11a. Thus, all three preconditions for an agreement under HYTA were met, and a "contract" was formed.

This Court, during oral argument, asked whether Mr. Temelkoski pled guilty with the understanding that he would receive HYTA. While no transcript of the plea proceedings exists today, the sequence of events and the surviving documents strongly suggest that Mr. Temelkoski's plea was induced by the expectation of receiving HYTA. The Register of Actions shows that when Mr. Temelkoski was arraigned on November 30, 1993, he initially entered a plea of not guilty. Appendix 1a, 5a. After various pretrial proceedings, a final conference was held on February 11, 1994. The Register for that date shows a "filing to place defendant on youthful trainee program" and that the case was "referred to probation for report." Appendix 6a-7a. A different version of the Register notes "4 YOUTH PRGM" and "REFER PROB." on February 11, 1994. Appendix 3a. A referral slip for the same date shows that the case was sent to probation as a "special referral: HYTA." Appendix 10a. Although the "Application and Consent—Youthful Trainee" form is undated, it relates to when the case was referred to probation for a HYTA assessment; thus it was signed prior to Mr. Temelkoski's plea and reflects his understanding that he was being evaluated for HYTA. Appendix 9a.

Mr. Temelkoski returned to court on March 4, 1994. Significantly, the court both accepted the plea and assigned Mr. Temelkoski to HYTA **on the same day**: the register of actions for March 4, 1994 states: "accepted guilty plea" and "defendant accepted into the youthful trainee program." Appendix 7a. Unlike a situation in which a defendant enters a plea on

[10] Beneath the signatures of Mr. Temelkoski and his mother, is a signed attestation from his attorney: "I certify that I have explained the provisions of the Act to my client, and he states that he fully understands." Application and Consent—Youthful Trainee Form, Appendix 9a.

one date and is sentenced some time later after the court can consider sentencing options, the timing in this case indicated that Mr. Temelkoski pled knowing what outcome he could expect when he left the courtroom. Moreover, at the time he pled guilty Mr. Temelkoski would have known the results of the probation assessment, which presumably recommended HYTA since Mr. Temelkoski was in fact granted HYTA.[11]

The state has argued that we cannot know with complete certainty whether Mr. Temelkoski was promised HYTA before he entered his plea (even though the timing and documents strongly suggest that he was). Since the judge had discretion to assign or not assign HYTA, the argument goes, the state never made a deal with Mr. Temelkoski. That argument fails for multiple reasons.

First, the state incorrectly assumes that Mr. Temelkoski could not have withdrawn his plea if—contrary to his expectations—the judge had denied HYTA. Without a plea transcript, the state cannot show that Mr. Temelkoski's plea was unconditional. If the plea was entered under *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993) (which was decided less than a year before Mr. Temelkoski's plea), Mr. Temelkoski would have had "an absolute right to withdraw the plea" if he did not receive HYTA. Furthermore, courts have allowed plea withdrawal when a defendant has been denied HYTA. *Bandy*, 35 Mich App at 57. See also *People v Khanani*, 296 Mich App 175; 817 NW2d 655 (2012) (allowing for plea withdrawal where a defendant was granted HYTA by the trial court, and the appellate court determined that granting HYTA was an abuse of discretion). Other diversion programs comparable to HYTA specifically allow for plea withdrawal if the defendant is denied admission into the program. See, e.g., MCL 600.1068(5) (allowing for plea withdrawal by defendant denied admission to drug

[11] The probation report appears to have been destroyed.

court); MCL 600.1094(3) (same for mental health court); MCL 600.1205(5) (same for veterans court).

Second, the argument that there was no deal because the court could have denied HYTA when the court in fact granted HYTA misunderstands how criminal justice system "contracts" work. Assume, for the sake of argument, that Mr. Temelkoski did not receive any assurances that he would get HYTA. Did he plead guilty and give up his constitutional rights in return for nothing? No, his plea and waiver of rights would have been in exchange for the **chance** to get HYTA. Similarly, Mr. Temelkoski's waiver of his speedy trial rights to allow for the probation investigation about his suitability for HYTA was in exchange for the chance to be recommended for HYTA.

For a defendant, "[t]he decision to plead guilty [] involves assessing the respective consequences of a conviction after trial and by plea." *Lee v United States*, 137 S Ct 1958, 1966 (2017).[12] Michigan courts have long recognized that the opportunity under HYTA to obtain a sealed record and freedom from civil disabilities is a key inducement to plead guilty. See *People v Palma*, 25 Mich App 682, 684; 181 NW2d 808 (1970); *People v Bobek*, 217 Mich App 524, 530; 553 NW2d 18 (1996). Mr. Temelkoski could not first try his luck at trial and then, if he lost, request HYTA. If he wanted to get HYTA, he had to plead guilty. That is true whether he pled with certainty that he would get HYTA, or whether he was taking a calculated risk (with knowledge of what was in the probation report) that if he accepted responsibility, he would probably get HYTA.

[12] *Lee* voided a conviction because the defendant did not know that his plea would make him deportable, and his desire to avoid deportation was determinative issue in plea decision. *Lee* thus recognizes that defendants may make decisions about waiving their constitutional rights based on anticipated consequences that have been traditionally understood as civil rather than criminal.

In contract terms, then, Mr. Temelkoski's plea and his consent to be adjudicated under HYTA can be understood as an offer—an offer that involves the waiver of constitutional rights. The judge's assignment of him to HYTA can be understood as the state's acceptance of that offer, creating the contract. Because all three of the preconditions for an agreement under HYTA occurred—the defendant's plea, the defendant's consent, and the judicial assignment—an agreement was made.

An example may clarify the point. Imagine an aspiring contestant for a reality TV show who applies, not knowing whether she will be selected. The application states the compensation that will be paid to participants and requires them to agree to mandatory arbitration over any disputes if chosen to be in the show. The applicant cannot know if she will be picked for stardom, but in order to be considered, she has to waive her right to sue. The TV producers do not have to select her, but if they do, they are bound to pay the promised compensation.

Finally, even where a defendant has made a bargain that does not involve the waiver of constitutional rights, that bargain becomes binding upon entry with the court. *Reagan*, 395 Mich at 318-19. Thus, in *Reagan*, this Court upheld the terms of deal where the prosecutor agreed to dismiss charges if the defendant passed a polygraph. The government argued during a second prosecution that the earlier deal had been a gift-type bargain that lacked the consideration necessary to make it binding. *Id.* at 314. Although the defendant had not pled guilty or waived constitutional rights, the government's "pledge of public faith . . . gave force to an [] agreement which became binding upon trial court approval." *Id.* at 318. Here too, when the court assigned Mr. Temelkoski to HYTA on March 4, 1994, the state made "a pledge of public faith" that the terms and conditions of that statute would apply.

The state has also argued that Mr. Temelkoski was not entitled to the benefits of HYTA at the time he pled guilty, but first had to complete court-imposed conditions, which in his case included completing three years of probation and 50 hours of community service, obtaining a high school degree or vocational training, and paying supervision fees. Order of Probation, Appendix 11a. All this means, however, is that the bargain in Mr. Temelkoski's case contained contingencies involving future performance: only if Mr. Temelkoski succeeded on probation would his case be dismissed, his record be sealed, and his freedom from any civil disability be locked in. Thus, the consideration required of Mr. Temelkoski to obtain the benefits of HYTA included not just his plea and consent, but also his successful completion of court-imposed conditions. Mr. Temelkoski knew at the time of his plea that he had to comply with the terms of probation in order to receive the benefits of HYTA, but he reasonably expected that he could do so.[13]

Contingencies for future performance are, of course, a common feature of contracts. See, e.g. Restatement (Second) of Contracts, § 3 ("A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances."); § 224 ("A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due."). Bargains envisioning future performance are also common in the criminal justice context. See, e.g., *Reagan*, 395 Mich at 309–10 (where the prosecutor agreed to dismiss charges if the defendant passed a polygraph test and the defendant

[13] While the judge could have revoked HYTA if Mr. Temelkoski failed to comply with his probation conditions, the judge could not have simply revoked HYTA for no reason, as a revocation without cause would have been an abuse of discretion. See *People v Webb*, 89 Mich App 50, 54; 279 NW2d 573 (1979) ("defendant had a constitutional right to a hearing prior to the termination of his trainee status and in the absence of a hearing, the criminal case against him cannot be reinstated"); *People v Roberson*, 22 Mich App 664; 177 NW2d 712 (1970).

then passed the polygraph, the defendant was entitled to rely on that agreement); *People v Lombardo*, 216 Mich App 500; 549 NW2d 596 (1996) (enforcing original plea agreement, where defendant upheld promise to cooperate with police investigation); *People v Jackson*, 192 Mich App 10; 480 NW2d 283 (1991) (agreement to cooperate in exchange for dismissal).

The fact that an early version of SORA was adopted while Mr. Temelkoski was still on probation does not change the analysis.[14] The terms of a contract are defined at the time the contract is formed. See 11 Williston on Contracts § 30:6 (4th ed) (contract interpreted in light of "surrounding circumstances when the parties entered the contract"); *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 201; 747 NW2d 811 (2008). Here, the "contract" was **formed** on March 4, 1994, when the court accepted Mr. Temelkoski's plea, he consented to HYTA, and the court assigned him to that status.[15] The fact that Mr. Temelkoski first had to perform the acts required of him under the contract (succeeding on probation) before the state's obligations (sealing of the record and freedom from civil disabilities) became due does not affect the date of contract formation.

In sum, the state entered into a bargain with Mr. Temelkoski when he pled guilty and consented to HYTA, and the court accepted that plea and assigned him to HYTA. We turn therefore, to interpreting the terms of the agreement between Mr. Temelkoski and the state.

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[14] The SORA statute in effect in April 1997 when Mr. Temelkoski was discharged from probation bears little resemblance to the current statute. After initial registration, a registrant needed only to notify law enforcement of a change of address, and even that did not require in-person reporting. 1994 PA 295, § 5(1).

[15] The terms of the "contract" included that Mr. Temelkoski complete three years of probation. Order of Probation, Appendix 11a. While courts can modify the terms of probation while a person is on probation, they cannot impose probation terms that continue after the person is no longer on probation. See *People v Kendall*, 142 Mich App 576, 579; 370 NW2d 631 (1985).

C. The Agreement Between Mr. Temelkoski and the State Incorporated the 1994 HYTA Statute by Reference.

"[W]hile analogous to a contract, plea bargains . . . must comport with the interests of justice in the administration of criminal laws." *Martinez*, 307 Mich App at 651. "Thus, the scope of a plea bargain is determined by its terms under principles of contract interpretation but those terms must serve the interests of justice." *Id.* See also *United States v Robison*, 924 F2d 612, 613 (CA 6, 1991) ("Plea agreements are contractual in nature. In interpreting and enforcing them, we are to use traditional principles of contract law."); *Lombardo*, 216 Mich App at 509 ("[T]he disposition of criminal charges must be reviewed within the context of its function of serving the administration of criminal justice.").

It is a basic principle of contract interpretation that "[w]hen a contract expressly incorporates a statutory enactment by reference, that enactment becomes part of the contract for the indicated purposes just as though the words of that enactment were set out in full in the contract." 11 Williston on Contracts § 30:19 (4th ed). The seminal treatise explains:

> Except when a contrary intention is evident, the parties to a contract—including the government, in a contract between the government and a private party—are presumed or deemed to have contracted with reference to existing principles of law. . . . Under this presumption of incorporation, valid applicable laws existing at the time of the making of a contract enter into and form a part of the contract as fully as if expressly incorporated in the contract. Thus, contractual language must be interpreted in light of existing law, the provisions of which are regarded as implied terms of the contract, regardless of whether the agreement refers to the governing law.

Id. See also *Gosnick v Wolff*, 366 Mich 573, 579; 115 NW2d 396 (1962) (noting that a contract includes "provisions which [are] incorporated therein by reference"); *Whittlesey v Herbrand Co*, 217 Mich 625, 628; 187 NW 279 (1922) (noting that outside materials may be incorporated by reference into a contract and that such outside materials are to be taken as a part of the contract just as though their contents had been repeated in the contract itself); *Hughes v White*, 5 Mich

App 666, 671; 147 NW2d 710 (1967) (statute regulating real estate brokers "may be considered to be incorporated by reference into [the parties'] contractual undertaking" regarding real estate). Thus the "contract" between Mr. Temelkoski and the state incorporates HYTA by reference.

Again, an example may be useful. A would-be homeowner contracts with a builder to build a house. The contract specifies that the home shall meet the local building code requirements. The contract itself need not detail plumbing and electrical standards because those are incorporated by reference. If the builder does not build to code—if the plumbing and electrical are deficient—the builder has breached.

When a contract incorporates a statute by reference and that statute has since been amended, courts look to the statute in effect **when the contract was made**. "[T]he general rule is that contracts are interpreted in accordance with the law in effect at the time of their formation." *McDonald*, 480 Mich at 201. In other words, because contracts are made within an existing legal framework, they are interpreted in light of that framework. See 11 Williston on Contracts § 30:23 (4th ed) ("as a rule of construction, changes in the law subsequent to the execution of a contract are not deemed to become part of agreement unless its language clearly indicates such to have been intention of parties"); *Von Hoffman v City of Quincy*, 71 US 535, 550 (1866) (stating that it is "settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to and incorporated in its terms"); *State Hwy Comm'r v Detroit City Controller,* 331 Mich 337, 352; 49 NW2d 318 (1951) (contracts "include the provisions of all relevant existing laws"); *Byjelich v John Hancock Mut Life Ins Co*, 324 Mich 54, 61; 36 NW2d 212 (1949).

Here, the agreement between Mr. Temelkoski and the state must be understood as incorporating by reference the terms of the statute in effect on March 4, 1994, the date on which

the contract was formed. The 1994 HYTA statute provided that upon successful completion of terms set by the court, Mr. Temelkoski would "not suffer a civil disability or loss of right or privilege" and that all records of his assignment to youthful trainee status "shall be closed to public inspection." 1993 PA 293, § 14(2)-(3). Put another way, the 1994 HYTA statute set out the consideration that Mr. Temelkoski was to receive in return for his plea. The fact that such key terms of the agreement are found in a statute, which was incorporated by reference in the plea, does not make those terms any less binding. Like the builder who must meet the terms of the building code to satisfy the contract, the state here must meet the terms of HYTA to satisfy the terms of its agreement with Mr. Temelkoski.

D. The State Must Honor Commitments It Makes in the Criminal Justice System.

The United States Supreme Court, recognizing that pleas are essentially contracts, made clear decades ago in *Santobello* that "when a plea rests in any significant degree on a promise" that induced the plea, "such promise must be fulfilled." 404 US at 262. The U.S. Supreme Court, this Court, and the lower Michigan courts have reaffirmed that principle time and time again. See, e.g., *Puckett*, 556 US at 137 ("When a defendant agrees to a plea bargain, the Government takes on certain obligations. If those obligations are not met, the defendant is entitled to seek a remedy."); *Mabry*, 467 US at 509; *In re Valle*, 364 Mich 471, 478; 110 NW2d 673 (1961); *People v Brooks*, 396 Mich 118; 240 NW2d 1 (1976); *People v Nickerson*, 96 Mich App 604, 607; 293 NW2d 644 (1980); *People v Stevens*, 45 Mich App 689, 692; 206 NW2d 757 (1973).

There is no dispute that Mr. Temelkoski pled guilty in reliance on the 1994 HYTA statute, consented to adjudication under that statute, was assigned to HYTA under that statute, successfully completed all the terms imposed on him, and had his charges dismissed with prejudice. Nor is there any dispute that, despite being promised a sealed record and no civil disabilities, Mr. Temelkoski is today subject to lifetime sex offender registration under SORA.

As this Court put it in setting out the questions for supplemental briefing, the HYTA "statute offer[ed] a benefit in exchange for pleading guilty, the defendant's plea [was] induced by the expectation of that benefit, but the benefit [was] vitiated in whole or in part."

Here, the benefits Mr. Temelkoski was to receive have been almost entirely eliminated. The 1994 HYTA statute provided that he "shall not suffer a civil disability or loss of right or privilege following his [] release from [HYTA] status because of his [] assignment as a youthful trainee." 1993 PA 293, § 14(2). Instead, Mr. Temelkoski is effectively subject to lifetime supervision, required to report to law enforcement in person every three months and to report many minor changes immediately. MCL 28.725(1); 28.725a(3)(c). Even assuming *arguendo* that the Sixth Circuit was wrong in *Snyder*, 834 F3d 696, in holding that SORA's restraints constitute punishment, SORA indisputably involves disabilities and loss of rights or privileges. Those restraints were imposed on Mr. Temelkoski solely because of his assignment to youthful trainee status.

The 1994 HYTA statute also provided that assignment to HYTA is "not a conviction for a crime" and that "all proceedings regarding disposition of the criminal charge and the individual's assignment as youthful trainee shall be closed to public inspection," 1993 PA 293, §14(2)-(3), and the court in Mr. Temelkoski's case entered an order on April 16, 1997, when Mr. Temelkoski's case was dismissed with prejudice, requiring that the "State Police shall retain a **nonpublic record**" of the dismissed charges. Appendix 14a (original emphasis). Instead, Michigan's public sex offender registry, which is run by the State Police, brands Mr. Temelkoski as a "convicted sex offender," lists March 4, 1994 as the date of conviction, describes his dismissed charges as the offense of conviction, and provides detailed personal information about him, including a photograph and a map to his home. Appendix 237a-246a.

While it is technically true that Mr. Temelkoski has not been convicted and his court file remains sealed, the widespread availability on the public sex offender registry of information about his dismissed charges (which are there described as a conviction) means that in reality he is subject to the same consequences he would have had if he had been convicted:

> The fact that one who is successfully released from the status of youthful trainee need not list the offense as a conviction when applying for a job seems like a hollow benefit if the person is at the same time required to be registered as a sex offender pursuant to the SORA. It would be easy enough for a prospective employer to access the established Internet Web site and discover the applicant's history. Knowing this, would not an applicant be wise to simply list the offense on an application and thus avoid the added problem of having the potential employer feel as if the applicant was being untruthful and attempting to hide a criminal past? Or, should the applicant wait for discovery and hope that the employer will be satisfied with an explanation on how the applicant is not considered to have been convicted on one hand, but is considered to have been convicted on the other?

People v Rahilly, 247 Mich App 108, 119-20; 635 NW2d 227 (2001) (Holbrook J., dissenting).

Thus, the question is not whether the state has reneged on its agreement with Mr. Temelkoski. It clearly has. The question rather is whether the state may use retroactive legislation to so renege. The answer is: it may not.

As the U.S. Supreme Court has explained:

> In both the civil and criminal context, the Constitution places limits on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects. This basic principle is one that protects not only the rich and the powerful, but also the indigent defendant engaged in negotiations that may lead to an acknowledgment of guilt and suitable punishment.

Lynce v Mathis, 519 US 433, 440 (1997) (citation omitted).

This Court, while never having addressed retroactive sex offender registration laws, has held that retroactive changes to the law which vitiate defendants' expectations in the criminal justice system violate due process. In *People v Gornbein*, 407 Mich 330, 334; 285 NW2d 41 (1979), this Court held that a constitutional amendment restricting bail eligibility could not be

retroactively applied. After the defendant was released on bond, the government sought to revoke his bond based on the new amendment. This Court rejected the government's argument that bond should be governed by the law at the time of the new bond hearing, finding instead that he was eligible for bond when bond was set and that it would be "fundamentally unfair" to apply the amendment retroactively. *Id.* at 333-34. Like in *Gornbein*, it would be "fundamentally unfair" to apply changes to the law retroactively to Mr. Temelkoski.

A recent unanimous decision from the Pennsylvania Supreme Court addressed a situation similar to that here. See *Commonwealth v Martinez*, 147 A3d 517, 532-33 (Pa, 2016). The court held that a defendant could not retroactively be required to register under an amended sex offender registration statute where the defendant had entered a plea agreement under an earlier version of the statute that exempted him from registration. The court further held that the new sex offender registration law could not lengthen two other appellants' registration terms where those defendants had been promised shorter registration terms under the old statute at the time they pled guilty. *Id.* at 533. Because "plea agreements clearly are contractual in nature," once a court accepts the plea, a defendant "is entitled to the benefit of his bargain through specific performance of the terms of the plea agreement."[16] *Id.* at 531, 533.

Martinez held that when defendants seek specific performance of a term of their plea agreements, the question is whether that term was part of the agreement. *Id.* at 532–33. The court

[16] The Pennsylvania Supreme Court decided *Martinez* on common law contract principles, as a matter of constitutional avoidance. 147 A3d at 530 n 16. Appellant believes that, for the reasons articulated in this and earlier briefing, this Court should hold that requiring Mr. Temelkoski to register is unconstitutional. Appellant, of course, has no objection should the Court prefer to reach the same result by applying common law contract principles.

thus declined to decide the "open question" of whether registration is punishment,[17] *id.* at 530 n 17, focusing instead on the fact that the defendants pled in return for specific registration consequences:

> When a person yields rights that our federal and state Constitutions recognize as fundamental, strict performance is required of the prosecution. This is so regardless of a subsequent change in the law, and irrespective of whether such change affects only a collateral consequence of the guilty plea.

Id. at 535 (Wecht, J., concurring).

Here, likewise, the state promised Mr. Temelkoski that if he completed probation under the Holmes Youthful Trainee Act, his record would be sealed and he would "not suffer a civil disability or loss of right or privilege." 1993 PA 293, § 14(2)-(3) (effective Jan. 1, 1994). Like in *Martinez*, the state cannot take away what it promised simply by passing a new law.

Where the state reneges on promises made to a criminal defendant, the appropriate remedy will depend on the circumstances. The remedy "might in some cases be rescission of the agreement" (i.e., plea withdrawal) and in other cases may involve requiring the government to "fully comply with the agreement—in effect specific performance of the contract."[18] *Puckett*, 556 US at 137. The defendant's preference is accorded "considerable, if not controlling weight."

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[17] The Pennsylvania Supreme Court has since held that Pennsylvania's sex offender registration statute imposes punishment and violates the Ex Post Facto Clauses of both the Pennsylvania and U.S. Constitutions. *Commonwealth v Muniz*, --- A.3d ---; 2017 WL 3173066 (Pa, July 19, 2017). That decision is highly relevant to Mr. Temelkoski's ex post facto claim.

[18] In *People v Gallego*, 430 Mich 443, 456 n 10; 424 NW2d 470 (1988), the Court adopted an alternative framework of detrimental reliance, which it defined as meaning "that no other remedy is available which would return defendant to the position he enjoyed prior to making the agreement at issue." The Court emphasized that the agreement there was **unauthorized**, as it involved police promising that the defendant would not be prosecuted if he returned buy money. *Id.* at 452. The state's agreement with Mr. Temelkoski was, by contrast, authorized and entered by the court. In any event, here the outcome under a specific performance rubric and under a detrimental reliance rubric is the same: given that Mr. Temelkoski not only pled guilty but then complied with all the court-ordered conditions of probation, the only way to cure the state's breach of its agreement with Mr. Temelkoski is to give him the benefits of that agreement.

Santobello, 404 US at 267 (Douglas, J., concurring). See also *People v Schulter*, 204 Mich App 60, 67; 514 NW2d 489 (1994) (reviewing court has discretion to order specific performance if plea agreement not fulfilled).

Specific performance is the appropriate remedy where, as here, "it would be fundamentally unfair ... to permit reinstatement of the original charges after a prosecutor has obtained the benefit of a defendant's compliance with the plea agreement." *People v Siebert*, 20 Mich App 402, 427; 507 NW2d 211 (1993); *Lombardo*, 216 Mich App at 511 ("particularly in light of the disparity in the respective bargaining positions, [it was impermissible] to permit the prosecutor to retain the right to withdraw the agreement even after defendant had acted in reliance on the promises contained in the agreement and had provided her full cooperation and the police and prosecutor received what they had bargained for"); *Schulter*, 204 Mich App at 62 (holding specific performance was appropriate remedy where defendant requested it); *People v Jackson*, 192 Mich App 10; 480 NW2d 283 (1991) (finding specific performance warranted and affirming dismissal of charges where defendant cooperated in exchange for prosecutorial promise not to prosecute but charges were brought); *People v Shipp*, 68 Mich App 452; 243 NW2d 18 (1976) (remanding for evidentiary hearing on whether there was a cooperation agreement between the prosecution and defendant, and requiring compliance with the terms of any such agreement); *People v Cotton*, No. 321146, 2014 WL 7450773 (Mich App, Dec 30, 2014) (finding that, because he cooperated with police to his detriment, defendant would be entitled to specific performance if trial court finds a plea agreement was reached); *People v Davis*, No. 308922, 2014 WL 2536988 (Mich App, June 5, 2014).

Mr. Temelkoski has already done everything required of him under HYTA: three years of probation, community service, high school graduation, and payment of supervision fees.

Probation Order, Appendix 11a; Order of Dismissal, Appendix 13a. Moreover, the charges against Mr. Temelkoski have been dismissed. Assuming it is even possible to withdraw a plea on dismissed charges, re-prosecution could raise double jeopardy problems, not to mention the practical difficulties of prosecuting events that occurred in 1993, almost a quarter century ago. Specific performance is the appropriate remedy here.

E. *Studier v Michigan Public School Employees' Retirement Board* Is Inapplicable.

Implicit in this Court's order for supplemental briefing is the question whether a vitiated criminal justice bargain is best understood as falling under the *Santobello* line of cases, discussed above, or under *Studier v Michigan Public School Employees' Retirement Board*, 472 Mich 642, 660; 698 NW2d 350 (2005). Order (June 9, 2017). The *Santobello* cases are grounded in due process, and address the unfairness of vitiating agreements made between the state and criminal defendants who, in expectation of a promised benefit, give up their constitutional rights or fulfill obligations to the prosecutor or to the court. *Studier* concerns the Contracts Clause and whether legislation about public employee health benefits creates a contract with such employees.

Because the *Santobello* line of cases is directly on point, and *Studier* is not, the *Santobello* framework is more appropriate. Michigan courts have continued to interpret plea agreements as contracts after *Studier* was decided, without ever suggesting the *Studier* changed the framework under which such agreements should be evaluated.[19] Even setting aside the fact that Mr. Temelkoski's case is a plea case, not a retirement benefits case, the legal reasoning of *Studier* is inapplicable because it concerns whether a statute, standing alone, creates a contract,

[19] See, e.g. *Martinez*, 307 Mich App at 651–52; *People v Blanton*, 317 Mich App 107, 125-26; 894 NW2d 613 (2016); *People v Cotton*, No. 321146, 2014 WL 7450773 at *3 (Mich App, Dec 30, 2014); *People v Davis*, No. 308922, 2014 WL 2536988 (Mich App, June 5, 2014); *People v Muttscheler*, No. 275411, 2008 WL 241254 at *1 (Mich App, Jan 29, 2008).

not whether, as here, the state can make agreements with criminal defendants pursuant to a statute that authorizes such agreements to be made.

Studier addressed the question whether a statue establishing health care benefits for public school retirees "created a contract with the public school retirees that could not be changed by a later legislature because to do so would unconstitutionally impair an existing contractual obligation" in violation of the Contracts Clauses of the U.S. and Michigan Constitutions. 472 Mich at 645. Under the Public School Employees Retirement Act, MCL 38.1301 *et seq.*, the Michigan Public School Employees' Retirement Board (board) provides a health care plan to retirees. 472 Mich at 646. The board amended that plan in 2000 to increase the amount of deductibles, co-pays, and out-of-pocket maximums that public school retirees were required to pay under the plan. *Id.* Plaintiff retirees argued that the original passage of MCL 38.1391(1)[20] in 1975 had created a contractual right to health care benefits, so any alteration of those benefits by successive legislatures violated the Contract Clauses of both the U.S. Constitution, art I, § 10, and the Michigan Constitution, Const 1963, art 1, § 10. See *id.* at 659. This Court rejected that argument, concluding that "the Legislature did not intend to create a contractual relationship with public school employees by enacting MCL 38.1391(1)", and that therefore the Contracts Clause did not bar the retirement board from amending the plan to increase the amounts retirees need to pay for their healthcare. *Studier*, 472 Mich at 366-67.

Studier is a case about contract formation, where a statute provided a benefit from the state to certain members of the citizenry who are the beneficiaries of that law. Because each new

[20] MCL 38.1391(1) provides: "[T]he retirement system shall pay the entire monthly premium or membership or subscription fee for hospital, medical-surgical, and sick care benefits for the benefit of a retirant or retirement allowance beneficiary who elects coverage in the plan authorized by the retirement board and the department...."

legislature should be free to revisit policy choices made by prior legislatures, the presumption is that laws are "'not intended to create private contractual or vested rights but merely declare[] a policy to be pursued until the legislature shall ordain otherwise.'" *Id.* at 662 (quoting *Dodge v Board of Educ*, 302 US 74, 79 (1937)). Because "'[p]olicies, unlike contracts, are inherently subject to revision and repeal,'" courts should not construe a law as creating a contract "'absent an adequate expression of an actual intent'" by the legislature to create a contract. *Id.* at 661-62 (quoting *Nat'l R Passenger Corp v Atchison, Topeka & Santa Fe R Co*, 470 US 451, 466-67 (1985)).

Studier's analytical framework is inapplicable here for two reasons: (1) *Studier* addresses whether a statute *by itself* can create a contract between the state and a class of potential beneficiaries, not whether agreements made between specific individuals and the state under a contract-authorizing statute are enforceable; and (2) *Studier* is premised on the need for legislative flexibility as circumstances (like costs) change over time, and here there is no question that the legislature has the flexibility to revise the diversion programs the state offers as circumstances change over time.

First, the question here is not whether the legislature created a contract with all HYTA-eligible youth by establishing the HYTA program. Rather, the question is whether the state made an agreement with Mr. Temelkoski when he pled guilty, he consented to HYTA and the court accepted his plea and assigned him to HYTA. An example drawn from *Studier* may clarify the point. Imagine that a retired teacher signs up in 2016 for a health insurance plan that covers hip replacement surgery in full and requires a basic annual premium for participation. In 2017 the retirement board approves an amended plan which requires copays for hip replacement surgery and requires the same basic annual premium. Both the 2016 and 2017 plans were adopted by the

retirement board pursuant to state legislation providing for public school retiree health plans. If the teacher breaks her hip in 2016, her surgery should be fully covered: she paid her premium and she is entitled to benefits outlined in the plan document. If she breaks her hip in 2017, however, she will have to pay the copays. Under *Studier*, the statute itself does not guarantee coverage, because the legislature must be free to make different policy choices over time. By contrast, the plan itself is an enforceable contract. The teacher cannot argue that the statute prevented amendment of the plan in 2017, but she can enforce the terms of her 2016 contract as to her 2016 health care claims.

Here too, the question is not whether youthful defendants today can demand that they be sentenced under the 1994 HYTA statute. The legislature did not make a contract with all youthful defendants between the ages of 17 and 21 that the 1994 version of the statute would forever be available. Rather, the state entered into a specific agreement with Mr. Temelkoski.

Statutes establishing diversion programs or problem-solving courts can be understood as the criminal justice equivalent of statutes authorizing state agencies to enter into contracts on behalf of the state and setting the parameters for what those contracts should contain. See, e.g., MCL 18.1221(6) (requiring rental of state-owned properties to "be at prevailing market rental values or at actual costs as determined by the director"); MCL 18.1237c(1) (capping liability and indemnification requirements for state contracts with architects, engineers and contractors). Similarly, the 1994 version of HYTA authorized the parameters under which individual criminal defendants could enter into agreements with the state. By creating that diversion program, the legislature authorized the players in the criminal justice system to dispose of cases by entering into agreements that were within those legislative parameters and incorporated the then-extant statute by reference. If a defendant was outside the parameters set by the statute—for example

the accused was too old to be eligible for HYTA (an age limit that the state has since changed)—no deal for HYTA could be made.

Studier itself recognizes that in some cases the legislature does intend for the state to make contracts: "If the statutory language 'provides for the execution of a written contract on behalf of the state the case for an obligation binding upon the state is clear.'" *Studier*, 472 Mich at 662 (quoting *Nat'l R*, 470 US at 466). HYTA does just that. It authorizes "[t]he state, in the persons of the prosecuting attorney and the judge," *Killebrew*, 416 Mich at 199, to enter into agreements with qualified youth. Those agreements are then memorialized in written court orders assigning the youth to HYTA. Thus, even if one were to analyze Mr. Temelkoski's case under *Studier* rather than *Santobello*, Mr. Temelkoski's individual agreement with the state is enforceable. HYTA is in effect a contract-authorizing statute setting the parameters under which individual criminal defendants can enter into agreements with the state. Once the state enters into those individual contracts, it is bound.

The second and related reason why *Studier*'s analytical framework is inapplicable here is that enforcing Mr. Temelkoski's agreement does not prevent the legislature from making different policy choices over time. The fact that Mr. Temelkoski is entitled to the benefit of the bargain he made with the state in 1994 does not mean that criminal defendants today could complain that HYTA has been amended and a similar bargain is not on offer now. The state is free to amend HYTA. But if the legislature decided, for example, to restrict HYTA to youth between the ages of 18 and 19, that does not mean the state could decide that 20-year-olds who bargained for HYTA in the past may now retroactively be treated as convicted criminals. The fact that the legislature can prospectively revise the parameters of the plea agreements it authorizes does not alter the fact that any given plea within the criminal justice system is made at

a specific time under a specific statutory regime that sets out the conditions applicable at that time.

In sum, Mr. Temelkoski's case is not like *Studier*. While the plaintiffs in *Studier* relied on the statute itself to contrive an unmodifiable contractual relationship between the state and beneficiaries of the statute, Mr. Temelkoski seeks specific performance of an individual contract that both he and the state were authorized to enter into under the 1994 version of HYTA. Thus, although the legislature is free to change the terms of HYTA and SORA prospectively under *Studier*, the state cannot use retroactive legislation to renege on the individual deal it made with Mr. Temelkoski.

III. THE WAYNE COUNTY CIRCUIT COURT HAD JURISDICTION OVER DEFENDANT'S CLAIM.

Mr. Temelkoski filed his motion seeking removal from the registry in the Wayne County (Third) Circuit Court on August 9, 2012. Appendix 1a. The motion did not seek relief based on the statutory exemptions from registration set out in MCL 28.728c, none of which apply to Mr. Temelkoski. Rather, the motion alleged that requiring him to register is unconstitutional. *Id.* The question posed by this Court is whether the Wayne County Circuit Court had jurisdiction over Mr. Temelkoski's claims in light of MCL 28.728c(4), a provision in SORA's petition-for-removal section which circumscribes judicial review of such petitions.

The term jurisdiction refers to "the authority which the court has to hear and determine a case." *Ward v Hunter Mach Co*, 263 Mich 445, 449; 248 NW2d 864 (1933). There is no question that circuit courts have the power to hear and determine constitutional claims. See *Campbell v St John Hosp*, 434 Mich 608, 613–14; 455 NW2d 695 (1990) ("[T]he Michigan Constitution vests the circuit court with broad original jurisdiction over all matters, particularly civil, so long as jurisdiction is not expressly prohibited by law" (citing Const 1963, art 6, § 13)). There is also no

question that Wayne County Circuit Court was the appropriate venue, as Mr. Temelkoski entered his plea and was sentenced there.[21] The only questions are (1) whether the legislature intended MCL 28.728c(4) to bar judicial review of constitutional claims, and (2) if so, whether such a jurisdiction-stripping statute can deprive litigants of any forum to bring constitutional challenges to registration?

MCL 28.728c sets out a petitioning procedure by which registrants who meet certain requirements may seek a court order allowing them to discontinue registration. MCL 28.728c(1)-(3). Essentially, the statute reflects a legislative policy decision that some registrants—Tier I offenders who have clean records for 10 years, juveniles with clean records for 25 years, juveniles under the age of 14, certain youthful offenders in consensual sex cases, and pre-2011 registrants whose offenses no longer require registration—should be eligible for removal from the registry. MCL 28.728c(12)-(15). That section also establishes procedures for filing such petitions (e.g., petition contents, hearing requirement, etc.), and sets out factors courts should consider in deciding on discretionary petitions. MCL 28.728c(4)-(11). Subsection 4, in addition to limiting petitioners to a single petition and specifying the court in which petitions should be filed, provides: "This section is the sole means by which an individual may obtain judicial review of his or her registration requirements under this act." MCL 28.728c(4).

We turn first to the statutory interpretation question: did the legislature intend MCL 28.728c(4) to bar judicial review of constitutional claims? Legislative intent to divest the courts of jurisdiction requires unambiguous statutory language, for "[t]he divestiture of jurisdiction . . . is a serious matter and cannot be done except under clear mandate of law." *Leo v Atlas*

[21] For statutory petitions seeking removal from the registry, MCL 28.728c(4) provides: "A petition filed under this section shall be filed in the court in which the individual was convicted of committing the listed offense." MCL 28.728c(4).

Industries, Inc, 370 Mich 400, 402; 121 NW2d 926 (1963). In construing statutes denying jurisdiction over a particular subject matter, "retention of jurisdiction is presumed and any intent to divest the circuit court of jurisdiction must be clearly and unambiguously stated." *Campbell*, 434 Mich at 614 (citations omitted). See also *Crane v Reeder*, 28 Mich 527, 532–33 (1874).

Where the legislature intends not just to divest a court of jurisdiction over certain subject matter, but to preclude judicial review of **constitutional claims**, the legislature's intent to do so must be particularly clear. The U.S. Supreme Court has "require[d] this heightened showing in part to avoid the 'serious constitutional question' that would arise if a [] statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v Doe*, 486 US 592, 603 (1988) (reading jurisdictional provisions of National Security Act to allow review of constitutional claims, thus avoiding constitutional questions posed if act were read to preclude judicial review). Even where statutes would appear to prohibit review of constitutional claims, courts will interpret those statutes narrowly to allow constitutional claims to be heard. See, e.g., *Johnson v Robison*, 415 US 361, 367 (1974) (holding judicial review of constitutional claims not barred by a statute that provided "no … court of the United States shall have power or jurisdiction to review any such decision"); *Oestereich v Selective Service System Local Board No 11*, 393 US 233, 238–39 (1968) (statute providing for no judicial review did not bar challenge to lawless government action).

Here, MCL 28.728c(4) does not show a clear legislative intent to foreclose judicial review of constitutional claims. Subsection 4 does not mention constitutional claims. The language, which is contained in the petition-for-removal section, simply limits review of "registration requirements under this act," rather than being couched as broad prohibition on review of all statutory and constitutional claims related to the statute as a whole. This opaque phrasing does

not present the "heightened showing" required to find that the legislature expressly intended to foreclose review of constitutional claims. *Webster*, 486 US at 603. Rather, because MCL 28.728c sets out categories of registrants who are eligible for statutory relief from registration, subsection 4 of that section is best understood as channeling and limiting review of such statutory petitions. For example, subsection 4 addresses the proper court in which such statutory petitions should be filed and limits successive statutory-relief petitions. *Id.* The narrow scope of subsection 4 is also apparent from the legislature's effort to make clear that it "does not prohibit an appeal of the conviction or sentence," which could of course implicate registration-related issues. MCL 28.728c(4).

The Court of Appeals' treatment of a similar provision regarding jurisdiction to review sentencing claims is instructive. MCL 769.34(10) provides:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.

In *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006), the court noted that "[r]ead literally in isolation, this language might seem to preclude this Court from granting relief" on a constitutional error, but concluded that because a statutory provision "cannot authorize action in violation of the federal or state constitutions … , MCL 769.34(10) cannot constitutionally be applied to preclude relief for sentencing errors of constitutional magnitude." To avoid holding the statute unconstitutional, the court construed it as inapplicable to claims of constitutional error, reaching that construction by reading the provision "in the context of the entire act" rather than in isolation. *Id.* See also *People v Powell*, 278 Mich App 318; 750 NW2d 607 (2008) (MCL 769.34(10)'s "limitation on review is not applicable to claims of constitutional error"). Here too, MCL 28.728c(4) should be read in the context of the entire act.

The legislative history also supports a reading of MCL 28.728c(4) as channeling statutory review petitions, rather than barring constitutional claims. The language was first added in 2004 (then subsection 8c(3)) as part of legislation that exempted post-2004 HYTA trainees from registration. 2004 PA 240. The 2004 SORA amendments created procedures by which certain pre-2004 HYTA trainees and certain juveniles registrants could petition for removal. *Id.* at § 8c. The "sole means" of review provision was added as part of the new petitioning section. Section 8c was amended in 2011, somewhat altering eligibility for removal petitions. 2011 PA 18. The "sole means" of review language was unaltered, though it is now found in subsection (4). The fact that none of the legislative analyses from either 2004 or 2011 suggest that this subsection was designed to deprive courts of jurisdiction is further evidence that there was no clear legislative intent to deny review of constitutional claims.[22] See *Johnson*, 415 US at 369–71 (construing statute not to bar judicial review of constitutional questions because legislative history did not demonstrate a legislative intent to preclude such review).

Should this Court nevertheless conclude that MCL 28.728c(4) is intended to prohibit judicial review of constitutional challenges to registration, then the Court must confront the "serious constitutional question" that arises when litigants are denied any judicial forum to raise constitutional claims. *Webster*, 486 US at 603. The answer to that question is clear: the legislature does not have the power to "foreclose the ability of the judicial branch to order an end to

[22] *See* House Legislative Analysis Section, Analysis of House Bills 4920, 5195, 5240 (Nov 12, 2003), http://www.legislature.mi.gov/documents/2003-2004/billanalysis/House/pdf/2003-HLA-4920-a.pdf; Senate Fiscal Agency, Analysis of House Bills 4920, 5240 (March 22, 2004), http://www.legislature.mi.gov/documents/2003-2004/billanalysis/Senate/pdf/2003-SFA-4920-A.pdf; Senate Fiscal Agency, Public Acts 17, 18, & 19 of 2011 (Aug 20, 2012), https://www.legislature.mi.gov/documents/2011-2012/billanalysis/Senate/pdf/2011-SFA-0188-N.pdf; House Fiscal Agency, Summary of Senate Bills 188, 189 and 206 (March 17, 2011), https://www.legislature.mi.gov/documents/2011-2012/billanalysis/House/pdf/2011-HLA-0188-5.pdf.

constitutional violations." *Sharp v City of Lansing*, 464 Mich 792, 808–09; 629 NW2d 873 (2001) (citing *Smith v Robinson*, 468 US 992, 1012 n 15 (1984)). *Sharp* rejected as irrelevant an argument that the legislature intended a particular statute to be "the sole remedy" for employment discrimination claims "because it is axiomatic that the Legislature cannot grant a license to state and local governmental actors to violate the Michigan Constitution. In other words, the Legislature cannot so 'trump' the Michigan Constitution." *Id.* at 810. See also *N Ottawa Cmty Hosp v Kieft*, 457 Mich 394, 403 n 9; 578 NW2d 267 (1998) ("[I]t is unquestioned that the judiciary has the power to determine whether a statute violates the constitution."); *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 374; 663 NW2d 436 (2003) ("[N]o act of the Legislature can take away what the Constitution has given."); *United States v Villamonte-Marquez,* 462 US 579, 585 (1983) ("no Act of Congress can authorize a violation of the Constitution" (citation omitted)).

Unsurprisingly, the Michigan Court of Appeals has repeatedly considered constitutional challenges to SORA without ever suggesting that MCL 28.728c(4) could bar such claims. See, e.g. *In re TD*, 292 Mich App 678, 681; 823 NW2d 101 (2011), *vacated as moot*, 493 Mich 873; 821 NW2d 569 (2012); *People v Costner*, 309 Mich App 220, 232–34; 870 NW2d 582 (2015); *People v Dipiazza*, 286 Mich App 137; 778 NW2d 264 (2009); *People v Golba*, 273 Mich App 603; 729 NW2d 916 (2007). For example, in *In re TD*, the court, citing the language of then-MCL 28.728c(3) (now subsection (4)), noted that TD was not eligible for relief from registration under any of the statutory registration exemptions in MCL 28.728c. 292 Mich App at 681. The court then proceeded to consider TD's constitutional challenge to registration, seeing no bar to judicial review of the constitutional issues. *Id.*

Similarly, in *Dipiazza*, where (as here) a HYTA trainee challenged his registration requirements, the Court of Appeals held that SORA is not only punishment as applied to HYTA youth, but is cruel or unusual in violation of the Michigan Constitution. 286 Mich App at 153–56. The defendant there had his case dismissed under HYTA in 2005, and filed his motion for relief from registration in 2008 before the sentencing court, seeking both statutory relief under MCL 28.728c (reduction of registration period) and constitutional relief (removal from the registry). *Id.* at 140. Neither the trial court nor the Court of Appeals ever suggested that courts lacked jurisdiction over the constitutional question. Indeed, because the trial court granted the requested statutory relief, only the constitutional question was before the Court of Appeals. *Id.* Here, Mr. Temelkoski, relying on *Dipiazza* as precedent establishing that registration of HYTA trainees is punishment, sought relief in the same manner as the Mr. Dipiazza: through a motion on constitutional grounds in the sentencing court. The Michigan courts have jurisdiction in Mr. Temelkoski's case, just as they did in Mr. Dipiazza's case.

In sum, given that litigants must have access to the courts to raise constitutional claims, MCL 28.728c(4) should not be read to bar judicial review of constitutional challenges to SORA. Counsel is not aware of any Michigan court that has ever read that statute to bar such judicial review, nor did the Wayne County prosecutor ever contest jurisdiction. The reason for this uniform acceptance of jurisdiction is simple: if MCL 28.728c(4) did prohibit Mr. Temelkoski from challenging his registration on constitutional grounds, then the courts would be powerless to prevent constitutional violations. That cannot be.

RELIEF REQUESTED

The judgment of the Court of Appeals should be reversed and the trial court's order granting Mr. Temelkoski's motion seeking removal from the sex offender registry should be affirmed.

Respectfully submitted,

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